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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 260

DORIS NYYSSONEN, Administratrix of the Estate of Einard Nyyssonen, Deceased,
Petitioner,

vs.

BENDIX CORPORATION,
Respondent.

PETITION FOR A NEW HEARING OR REHEARING

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On October 4, 1965, there was published, in the Federal Reporter, a new decision by the Court of Appeals for the Fourth Circuit, *Bullard Company* v. *General Electric Company,* 348 F.2d 985, 990, in decided conflict with the decision of the Court of Appeals for the First Circuit in the present case, wherefore the petitioner respectfully prays for a new hearing, or a rehearing, with respect to this Court's denial of her petition for certiorari, and particularly with respect to her Questions Presented IV, V and VI.

INTRODUCTION

The Fourth Circuit case will be discussed presently. It is desired first to emphasize, however, that the petitioner is here raising Constitutional questions. She complains that she has not received the kind of trial to which she is constitutionally entitled. She complains that her case has been decided, in the District Court, not by the District Judge, as required by the Constitution, but by a so-called master, belatedly appointed at the very end of the taking of the testimony; and that the Court of Appeals for the First Circuit, instead of deciding the case for itself, has contented itself with merely construing Rule 52(a) of the Federal Rules of Civil Procedure as authorizing this procedure in the District Court.

If this case had come up before 1925, therefore, the petitioner would have been heard in this Court. One of the principal objections to the legislation of that year was based upon the concern of Congress that, under its provisions, "Constitutional rights might go unprotected", Alpheus Thomas Mason, "William Howard Taft", Simon and Schuster, 1965, page 111.

The petitioner is not, by her petition for certiorari, asking for review of this case upon the merits. Such a review is not possible, because the petitioner has never received any decision upon the merits. The petitioner is asking only that there be restored to her her Constitutional right to a fair trial in the District Court,—a trial decided by the District Judge himself, as in all other cases in that District Court, and not by a belatedly appointed so-called master.

This Constitutional right to a fair trial, however, the District Judge has refused to grant, assigning, as his rea-

son for this refusal, that he lacks the necessary technical training upon the basis of which to understand the case.

But the judge made no effort to obtain such an understanding. How could he possibly obtain such understanding in the absence of testimony which he refused to hear at the trial (R. 387, lines 18-24, R. 1014, lines 9-22), or in the absence of oral argument, which he also refused to hear?*

The judge himself recognized the fact that, by delegating the decision of this case to the before-mentioned belatedly appointed so-called master, he was doing something that he had no right to do. He admitted (R. 1027) that he was thereby depriving the petitioner of the benefit of his "original thought or expression", and also that

> "It is no service to the integrity of the process of justice or the development of the law for a judge to pretend otherwise."

He admitted, therefore,—and he could not "pretend otherwise",—that he was thereby denying to the petitioner the kind of Constitutional trial that he gives to all other litigants, as he himself says that he does, in his recent book "Whereas", Little Brown and Company, 1965, page 4, lines 8-10.

In that book, he expressed great admiration for the late Judge Jerome Frank. The views of Judge Frank, upon this very topic, are already before this Court (Reply Brief, pages 23a-25a).

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*On the same page 111, Professor Alpheus Thomas Mason quotes Senator Thomas J. Walsh as protesting against the 1925 legislation upon the ground that a litigant should not be "compelled" to submit his case "without oral argument", thus burdening him "with the odds all against him".

All that the petitioner asks is that she be accorded her *Constitutional right to the equal protection of the law.* She maintains that she should not be deprived of the same Constitutional right to a fair trial that all other litigants receive in that same District Court, and that Judge Frank insisted that all litigants should receive in all courts.

QUESTIONS PRESENTED IV, V AND VI

Question Presented V

Returning now to the recently decided case in the Fourth Circuit, it appears that, in that case, as in the present case, owing to lack of technical training, the District Court appointed a so-called master.

Though, unlike the present case, the District Court in the Fourth Circuit case, 234 F. Supp. 995, 996, was fully "conscious of its ultimate judicial responsibility to decide the issues presented" for itself, and not to abdicate in favor of the so-called master, the Court of Appeals for the Fourth Circuit nevertheless strongly criticized such procedure.

In the present instance, on the other hand, the Court of Appeals for the First Circuit fully approved the procedure that the Court of Appeals for the Fourth Circuit thus criticized.

The petitioner therefore prays that this Court grant her petition for certiorari with respect to at least Question V, in order to resolve this conflict.

It is respectfully submitted that this Court should instruct the District Courts that, in cases where they admit lack of understanding of a case, because of insufficient technical training, they should at least receive full evidence at the trial and listen to oral argument.

In the present instance, particularly with a District Judge of "unusual intellect"* (R. 1162), who impersonates "a combination of Lord Mahsfield and Fiorello LaGuardia", *McLaughlin* v. *Venore Transportation Company*, 1965, D.C. Mass., 244 F. Supp. 802, 806, his lack of understanding would have disappeared entirely had he received the proffered evidence and testimony at the trial (R. 387, lines 18-24, 1014, lines 9-22) and had he received oral argument (Reply Brief, page 4, the second complete paragraph).

Question Presented VI

The petitioner exercised her legal right to file motions under Rules 52(b) and 59(a), the latter of which raised up the Court's refusal to receive evidence at the trial (R. 1014, lines 9-22). She was constitutionally entitled to a hearing thereon, both oral and written, particularly in a situation where the District Judge admitted that he did not understand the case. She was not heard, however, *either* orally or in writing.

Question Presented IV

The Court of Appeals for the Fourth Circuit held (page 986) that, under the circumstances of the case before it, the "clearly erroneous" provision of Rule 52(a) of the Federal Rules of Civil Procedure was not applicable, and it thereupon decided the case for itself.

In the present case, on the other hand, under almost identical circumstances, the Court of Appeals for the First Circuit held that that "clearly erroneous" provision of Rule 52(a) *was* applicable, and it refused to decide the case for itself.

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*The petitioner does not charge the District Judge with lack of judicial capacity, as did this very same District Judge recently with respect to a judicial appointee. But judicial laziness may as inexorably lead to a failure of justice as lack of judicial capacity.

REASONS FOR GRANTING THE WRIT

Altogether aside from the fact that the petitioner has been denied her constitutional rights, the District Courts are continually confronted with situations as to which they are not technically trained, and they will become more and more so confronted as technology advances. The difficulties, moreover, are by no means restricted to patent suits. In Chapter 12 of his book, "A Judge Comes of Age", Charles Scribner's Sons, 1940, as one example only, Judge John C. Knox discussed quite a number of non-patent cases which, on page 217, he said that he "faced" "almost with dread".

It is believed to be now the duty of this Court, therefore, to attempt to solve this problem. If it should decide that it can not do so, the matter should be called to the attention of Congress; otherwise that task will have to be performed by the laity. Perhaps, if this Court can not solve this problem under the present law, Congress should be asked to reconsider its before-mentioned legislation of 1925.

Wherefore the petitioner prays that this petition for a new hearing or rehearing be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the above petition for a new hearing or rehearing is presented in good faith and not for purposes of delay, and that it is restricted to grounds specified in Rule 58 of the Rules of this Court.

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